

RAPKIN ON REAL ESTATE LAW

We first want to thank you for the support that we have received during these past few months as we opened our new Law Offices. During this time, we have had the opportunity to survey the current real estate landscape and how it is affecting both buyers and sellers. We have found that certain common issues are arising and this letter is intended to give you a “heads up” on these particular areas of the law, including during the sale of real property.

A written contract is required for short sales, deed in lieu of foreclosure sales, and conventional sales that are not “forced” sales. Real estate brokers, real estate developers, escrow agents, and even many stationery stores supply a standard printed form for the seller and buyer to use. These forms look authoritative and are used time and again. Although they work most of the time, sales contracts often need to be adapted because they contain objectionable provisions. Also, these forms cannot and do not ascertain the propriety and adequacy of every transaction. In sum, the forms are not specific and, therefore, will not address all of your particular needs.

In these times of high incidents of foreclosure sales and anxious sellers, as well as buyers looking to “steal” a primary residence or investment property for themselves, legal problems occur because buyers and sellers don’t buy or sell what they thought they were buying or selling. We recommend that a lawyer be retained **before** the sales contract is signed by the parties and **before** any disputes arise. There are legal rights and obligations involved in the purchase and sale of real estate. Why rely on non-lawyers to give out legal advice, especially if the non-lawyer has an economic interest in consummating the transaction? Use your lawyer to clarify these legal rights and obligations.

Here are five points that buyers and sellers need to carefully consider during the sales process:

1. **“As Is” Provisions.** An “as is” provision places the entire burden of ascertaining the condition of the property upon the buyer. However, an “as is” provision does not excuse a seller from disclosing hidden, material defects known to the seller. A “material defect” is one that affects the property’s value or desirability such as structural defects, termite infestation, and building code violations.

Failure to disclose such material defects constitutes fraud. The “as is” provision applies only to visible, observable matters. Sellers need to disclose these, and other known material defects, if they know about them, or should know about them.

2. **Transfer Disclosure Statements.** Transfers of real property that consist of one to four dwelling units (with some exceptions) require the seller to disclose to the buyer a full and accurate written disclosure of material facts such as defects and malfunctions to the property, the existence of lawsuits affecting the property, environmental hazards, adjacent neighbor issues, nuisances, drainage problems, etc. The sales agents, if any, are also obligated to disclose material facts they discover during the agent's reasonably competent and diligent visual inspection of accessible areas of the property.

There are other written disclosures the seller must provide including, but not limited to, natural hazard disclosures, health and safety disclosures, new home sales disclosures, and common interest development disclosures.

3. **Contingencies.** A purchase agreement often contains one or more contingencies that must be removed within specified time periods after acceptance. If they are not removed, one or both of the parties may cancel the purchase agreement. The most common contingencies pertain to financing (the buyer must be approved for a loan, in the required amount, with certain specified terms); appraisal (the property must appraise at no less than the specified purchase price); buyer's investigations (buyer must approve inspection reports, seller disclosures and documents, and any other investigations and inquiries buyer chooses to make); title (buyer must approve seller's title and accept liens and encumbrances on the property that will survive close of escrow); and sale of another property owned by the buyer (performance not required unless buyer sells a specified property).

The "contingencies" portion of the sales contract needs to be carefully prepared in order to give the parties a legal way out of the contract if the contingencies don't first occur.

4. **Covenants, Conditions and Restrictions.** If you intend to reside within a homeowners association you had better carefully read - or have a knowledgeable lawyer read - the Covenants, Conditions and Restrictions ("CCRs). A resident of a condominium development, for example, can be prevented from living with pets, using the swimming pool and Jacuzzi after certain hours, making structural modifications to their unit, maintaining certain businesses within their unit, and painting the exterior of their units a particular color.

The CCRs are typically more than 60 pages long, but your attorney will know what to look for and can cut the time down to determine your rights and restrictions.

5. **Deeds in Lieu of Foreclosure and Short Sales.** Owners of real estate who give their lenders a deed in lieu of foreclosure might not be "off the hook". The deed will not extinguish the note and trust deed, nor a junior lien, in the absence of an agreement with the lender/creditor to accept the deed in lieu and to allow for the cancellation of the note, the reconveyance of the deed of trust and/or the extinguishment of the junior lien.

Further, there are potential tax consequences to the extent the lender forgives underlying debt. Even in a short sale, where the secured lender agrees to accept less than the outstanding loan balance as full satisfaction of the loan obligation, there can be tax implications. A seller considering a deed in lieu or a short sale should consult with a tax professional.

Changes in the Law. Every year there are changes in real estate law due to recent court cases and legislation. Here are four recent changes:

1. The standard California Residential Purchase Agreement, mentioned in the second paragraph of this letter, precludes an award of attorney's fees for those parties who commence litigation before attempting to mediate a dispute arising out of a purchase and sale of real property. Wording was added to the standard form due to a court case called Lange v. Schilling.

2. A court ruled that specific performance is available to a non-defaulting buyer even if the property is being purchased for investment purposes. See Real Estate Analytics, LLC v. Vallas. This means that a seller who is in default in selling a commercial, industrial, or residential building held for investment purposes can lose the property rather than just be held liable for damages for his breach of contract.

3. A new law now imposes limitations on the lender's right to conduct a non-judicial foreclosure sale in connection with owner-occupied real property if the underlying loan was made between January 1, 2003, and December 31, 2007. See California Civil Code Section 2923.5. This statute was enacted to provide foreclosure relief to homeowners and requires a party seeking to foreclose on owner-occupied, residential real property to contact the borrower "in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure."

4. A recent case decided that even though an "all risk" insurance policy included mold, the damages were not covered because the mold was caused by excluded third party negligence, corrosion, and continuous or repeated seepage or leakage of water. Freedman v. State Farm Insurance Company.

If you have any questions regarding the updates that we have provided in this letter, or if you believe that we can be of assistance to you in any other matter, please don't hesitate to call on us.

The Law Offices of Michael S. Rapkin has for over 34 years represented clients in the purchase, sale, lease and/or operation of all types of real property; has set up limited liability companies, limited partnerships and joint ventures to acquire, develop and launch business and/or real estate projects; and has extensive litigation experience in real estate issues such as actions for specific performance, boundary disputes, breach of contract actions, construction defects, fraud, insurance bad faith, lease disputes, fraud, business, and contractor and real estate developer disputes.